UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK
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UNITED STATES OF AMERICA,

v. 22 CR 673 (LAK)

SAMUEL BANKMAN-FRIED,

Conference

Defendant.

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New York, N.Y.
August 11, 2023
2:00 p.m.

Before:

HON. LEWIS A. KAPLAN,

District Judge

APPEARANCES

DAMIAN WILLIAMS
United States Attorney for the
Southern District of New York
DANIELLE SASSOON
NICOLAS ROOS
SAMUEL RAYMOND
THANE REHN
DANIELLE KUDLA
Assistant United States Attorneys

COHEN & GRESSER LLP
Attorneys for Defendant
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CHRISTIAN R. EVERDELL

ALSO PRESENT: KRISTIN ALLAIN, FBI Special Agent
JOHN MOSCATO, Pretrial Services Officer

(In open court; case called)

THE DEPUTY CLERK: Government, are you ready?

MS. SASSOON: Yes. Good afternoon, your Honor. Danielle Sassoon, Nick Roos, Sam Raymond, Thane Rehn, and Danielle Kudla for the United States. We are joined by Special Agent Kristin Allain of the FBI and John Moscato from probation.

THE COURT: Good afternoon.

THE DEPUTY CLERK: Defendant, are you ready?

MR. COHEN: Yes. Good afternoon, your Honor. Mark Cohen for Mr. Bankman-Fried.

MR. EVERDELL: Good afternoon, your Honor. Christian Everdell for Mr. Bankman-Fried.

THE COURT: Good afternoon.

Now, I do appreciate everybody coming in on the least popular schedule that I could conceivably have devised, but it was necessary for a variety of reasons, and I gather I am not the only one doing this at the moment.

Ms. Sassoon.

MS. SASSOON: Yes, your Honor. And I have my code book today.

THE COURT: Well done.

MS. SASSOON: Your Honor, I stood before you recently and you now have the benefit of two letters from the government, and so you have our view of the seriousness of the

conduct here, as well as what we believe it shows about the defendant's deliberate evasions of his bail conditions and why these facts warrant detention.

But Just as a brief recap, we have previously homed in on what the undisputed facts are here, and I will just recap them briefly:

The Signal message to the FTX US general counsel, after the defendant was arrested, that referred to being resources for each other and vetting information.

The use of a VPN that concealed the defendant's internet activity.

THE COURT: Just pause on that one for a minute.

How is that exactly an evasion of the bail conditions? I understand that he was evading his contractual obligations and duty of candor to the vendor, but focus on the bail conditions.

MS. SASSOON: Yes, your Honor.

At the time that had happened, the Court had been notified about what the government considered the improper contact with Witness-1, and the parties were in the process of designing a set of conditions that would allow the government to monitor the defendant's internet activity and phone activity. And although those conditions had not been solidified, the purpose of those conditions was plain, the Court's interest in those conditions was plain, and while that

was ongoing, the defendant did something that was contrary to that objective, which was concealing what he was doing on the internet, after concerns had been raised about using a device to tamper with a witness.

THE COURT: Thank you. Go ahead.

MS. SASSOON: I will just note that that is one example where there was a red flag, but there was also a limit to what the government can ultimately know about how the VPN was used.

So, certainly a VPN is capable of being exploited to do certain things on the internet that would be problematic, but the use of the VPN itself prevents the government from knowing exactly what the defendant was doing, which in our view is an ongoing problem here with the existing bail conditions.

Then more recently you have the secretive sharing of information about Caroline Ellison, including her writings, in a fashion that was difficult to detect and that evaded detection through the monitoring that had been put in place on the defendant's e-mail and phone.

And this activity was part of what the defense concedes was an ongoing media strategy to influence the public and potential jurors', effectively, views of the case.

THE COURT: He has got a right to try to influence the public up to a point, right?

MS. SASSOON: Yes. And nobody disputes that, and we

have emphasized that in court and in our papers. We don't view this as a First Amendment issue given the means by which the defendant tried to do this, which we consider amounting to witness intimidation and tampering.

THE COURT: So the line, if I understand you correctly, is where the intent, in whole or in part, is to influence, intimidate, or various other things a witness, yes?

MS. SASSOON: I think it's the intent, and I think that intent is clear here. But I also think the substance of the communication matters too. If he came out and said, I'm innocent or I dispute the allegations in the indictment, that's one type of communication. Whereas, if the substance of the communication can only be understood as trying to influence the public's opinion by discrediting and harassing a witness, that's both part of the witness intimidation, but also part of what the rules, in governing the conduct of the attorneys at the very least, consider tainting the jury and making improper communication.

THE COURT: The conduct informs one's view of the intent, that is, the substance of the communication, right?

MS. SASSOON: Yes.

In our view, the defense has not really engaged with their view of what the least restrictive conditions should be if the Court accepts the government's view of the evidence. They have raised concerns about discovery access in the event

that the defendant is detained. We have spoken to a number of facilities, in light of the concerns that have been raised, and Putnam County Correctional Facility has represented to us that in the event the defendant were detained and designated to that facility, they would permit the defendant to have a laptop that is enabled for internet-based discovery review, which I think would largely address the concerns raised by the defense.

Again, that's in the event that the defendant is detained. If that were to happen, that laptop would still require some time to prepare, but it is feasible and the facility is willing to accommodate that.

THE COURT: How much time?

MS. SASSOON: I would estimate about a week.

THE COURT: Okay. How do you avoid, if he were designated to Putnam CF, use of the internet for purposes other than trial prep, or are we getting right back to where we started months ago?

MS. SASSOON: The goal would be to implement features similar to the laptop that the defendant currently is able to use -- namely, one that would only permit access to the defense's Relativity database and to the AWS database.

THE COURT: Okay. Go on, please.

MS. SASSOON: Your Honor asked the parties to come prepared not only to address the possibility of detention, but also alternatives to detention. And as I mentioned, the

defense, in our view, hasn't posited less restrictive conditions that would be adequate here if you accept our understanding of the evidence. And the existing conditions, in our view, are not adequate, and those followed extensive negotiations between the parties to design conditions meant to be tight, in fact. And we don't think that the order governing extrajudicial statements alone is sufficient, given what your Honor noted about the difficulty of enforcing such an order, and therefore the potential for abuse by a defendant who, like this one, would be intent on evading his bail conditions.

It's also a challenge here to design appropriate pretrial conditions for a defendant who, in our view, has intentionally found ways around what were already carefully designed conditions. And I would point out specifically how the defense requested access to Google Drive, claiming that that was necessary for defense preparation, and that was the tool used to find these documents that were provided to the New York Times.

We put in monitoring --

THE COURT: You say to find these documents?

MS. SASSOON: Yes.

THE COURT: Do we know anything about how they were stored, who was supposed to have access, whether these were files that he had personal access to for appropriate reasons? What's the story, if we know?

MS. SASSOON: My understanding is that they came from his own personal Google Drive account. But I noted in our most recent letter we asked the defense to provide versions of the documents that were not in PDF format, that would include metadata in the original format of the documents, and those have not been provided to the government.

I would also note that the final bail order included monitoring of the defendant's phone and of his Google account. And so here the defendant shared the documents in person, which I see no other purpose for that than to avoid an electronic trail of forwarding these documents, which I also think bears on the intent.

THE COURT: My recollection is that he invited the reporter to visit him, yes?

MS. SASSOON: Yes.

THE COURT: Where was the reporter coming from and going to for the purpose of that visit?

MS. SASSOON: So the reporter visited him at his residence.

THE COURT: Palo Alto?

MS. SASSOON: Yes.

THE COURT: Is the reporter normally based in New York?

MS. SASSOON: I don't know the answer to that.

I would also note that the parties took pains to

design a set of conditions to restrict the defendant's behavior in his residence in California. The defendant is increasingly traveling to New York for conferences, and presumably for trial preparation, and that is a gap in the conditions because he is effectively unsupervised when he is here.

So, in the event that the Court is considering additional restrictions short of detention, at the very least the government thinks that home incarceration would be appropriate, no visitors, no internet, except to access the database, the discovery database, and to conduct attorney Zoom meetings, and no access to the Google Drive. And I think that that access is addressed by the fact that the government has produced materials from Google in discovery, and although the defendant already had access to his personal Google Drive to date, the government will be producing shortly its own production of those materials, which -- this was noted in our letter -- were inadvertently not produced by Google in their initial search warrant return.

I am happy to address any other questions the Court has about our letter or the evidence.

THE COURT: Thank you.

Mr. Cohen.

MR. COHEN: Thank you, your Honor.

THE COURT: Mr. Cohen, before you get rolling, maybe you know the answer to the question where the reporter came

from.

MR. COHEN: I believe he is based in California, your Honor.

THE COURT: Where in California?

MR. COHEN: I don't know, but I believe we have representatives of his employer in the courtroom.

THE COURT: Go ahead.

MR. COHEN: Your Honor, I think it's telling there were two things that were absent from the presentation the Court just received: One was a discussion of the relevant legal standards that govern here, and the relevant case law that governs here; and two, the government continues with what I would call argument by conclusion. When your Honor just asked the question about what was wrong with the use of the VPN, the response was, it's wrong because we say it's wrong.

THE COURT: I must have missed that.

MR. COHEN: That was certainly how we took it.

But let me go back to the legal standard, your Honor. The government, as we understand it, at least as of last week, is moving under two statutes, 3148 and 3142(f)(2)(B). And under those standards, it has the burden under 3148 of showing that there is probable cause to believe that the defendant committed a crime.

Here, they are relying upon, as I understand, 1512(b), which requires that the defendant act with a knowing and

willful or evil purpose to threaten, intimidate, or corruptly persuade, or attempt to do so, a witness. And that there is no condition or combination of conditions that will assure the safety of a person or the community, or the defendant is unlikely to abide by those conditions.

THE COURT: And if probable cause is found --

MR. COHEN: There is a rebuttal presumption.

THE COURT: -- there is a presumption.

MR. COHEN: There we think the presumption was rebutted because there are conditions that the Court can design -- and designed last week, in fact -- to address the concern, which was the temporary order the Court entered on the consent of the parties. And certainly we think that does it, in terms of resolving this issue, but we would be amenable to any other condition the Court thought was appropriate.

And when you look at the cases that construe these legal standards, your Honor, the case cited by the parties is *LaFontaine*, and it's one of the leading Second Circuit cases on that. The facts in that case are so dramatically different from what we have here, where there was a finding that the bail should be revoked. There you had a bail condition that said the defendant should not contact Witness-X, and it was undisputed that the defendant went out and contacted Witness-X. You had an indictment of the defendant for witness tampering. You had an MCC tape in that case that had been played by the

defendant for the witness in violation of the protective order. And even on that record, Judge Mukasey, who was the district court judge at the time, determined it was a close call to order remand. And the Circuit in affirming said -- and I am at page 7 of the printout, but I can get the actual page for your Honor -- although we, like the district court, deem this aspect of the case a close call, they were not going to overturn the district court's determination.

And that's on facts that we would submit, your Honor, are dramatically different from what we have here. We don't really have on this record a basis to satisfy the standard. We are not even close to *LaFontaine*. We are not close to the *Brown* case, where there was proof that the defendant had offered a bag of cash to the witness. We are also not close on the 3142(f)(2)(B) standard, which your Honor addressed in the *Stein* case, and also the Circuit addressed in the *Vendetti* case, where the facts were very, very extreme of pretty obvious repeated violations on a record that was not disputed.

And here we have, frankly, with respect, a very thin record with a lot of spin. Let's start with Witness-1. When we were last before your Honor on this, this was sometime in March or April. I apologize, I don't remember the exact date. We were told, your Honor, this is a dramatic, dramatic situation, it's a terrible thing, our client has attempted to tamper with Witness-1. We objected to that characterization

for record purposes, which the Court permitted us to do, but we didn't litigate the issue because we thought we had resolved it with a practical bail condition.

It gets raised now again, re-purposed as some effort to create a pattern, maybe to get the Court to find there is a pattern here. But since that time in March and April, we have gotten discovery from the government, which we didn't have at the time, and also have been able to do our own review, which shows that that e-mail and Signal chat in question was the end of a sequence, not the beginning of a sequence.

THE COURT: Well, I question that, frankly. The sequence of documents involves an exchange of some messages in the middle of November, initiated you say by Witness-1, and that may well be true. And then we have the January 15 e-mail, which is what you're talking about that the government relies on. And in between there was something very important. The company went bust. The defendant got arrested. He was charged. And what went before and what went after I find a lot of trouble in reconciling.

MR. COHEN: Although the in-between is more complicated, your Honor. It's not one message from Witness-1. It's a follow-up message on November 13, at a time when we know, because it was public, that the defendant was under investigation, at a time when we now know that Witness-1 and others were meeting with the government about the defendant.

THE COURT: But not known then.

MR. COHEN: I think it was known then. The meetings with the government were public.

THE COURT: Where is the evidence of that?

MR. COHEN: It was reported, I don't have it in front of me, your Honor.

And then, I think the fair interpretation of this, your Honor, is there's a couple of reach-outs. There is an effort to help. My client making many public statements that the government has pointed to, that he doesn't back away from, that he was trying to help restore customers, get funds back for customers. And then the final end of the sequence, the reach-out to Witness-1, John Ray, and the law firm for the company.

Now, the notion that someone is trying to tamper with a witness, or tend to tamper with the witness, makes no sense when we are talking about the general counsel of a company, that he doesn't control, who himself is represented by his own counsel, who is working with company counsel, who is reporting to the government. It doesn't make any sense that this would be the basis for some alleged tampering. And the government, with respect, is so hard-pressed, in its reply we are getting interpretations of whether he used the word "resource" or "resources," and we are told the use of the plural tense is what turns this into witness tampering.

Judge, that is nothing like what was in *LaFontaine*. That's nothing like what was in the other cases that both parties have cited, and I am sure the Court is very familiar with. It doesn't meet the standard under 3148. And it doesn't meet the standard under 3142.

Now, turning to the other topics, I thought your Honor asked a very good question about -- all your questions are very good, but the question about VPN, that is not offered as evidence of witness tampering because it couldn't be. It's a very circular way to get to some effort to violate bail conditions, when the use of a VPN, I think it's undisputed, is not inherently deceptive. It's used by companies to give remote access. It's used by the government. And, in fact, the solution to give access to the AW database that the debtor insisted upon, when we did that long document for the Court's approval, was that a VPN be used. So that doesn't carry the day.

And that brings us to really the only thing new, which is the communication with the reporter. And one thing we should start with is, the only reason we know about this, your Honor, is because the defendant was complying with his bail conditions. A security guard reviewed the reporter. He was logged in. The communications that were made were made on the pen register. And, as we went over last time, there has been conservatively a million stories about this case, hundreds of

thousands about the defendant.

THE COURT: And there is no record at all, other than the three or so pages you have turned over, of what passed between your client and the reporter in that meeting, or in whatever it was, or of preceding conversations on the telephone, save whatever notes the reporter may have, which he is not about to turn over without going from here to the Supreme Court and back.

MR. COHEN: Right.

But, stepping back, there was no gag order in the original bail conditions or any of the modifications either before the magistrate judge or before your Honor. A defendant, as we have discussed last time and in our submission, is permitted under the First Amendment to speak about his case, to speak about his view of his case. He is not limited, as counsel just suggested, to saying, I think I'm innocent, that's it.

THE COURT: Of course not. But do you disagree that the law is that once the communication is undertaken as part of or with the intent to intimidate or influence a witness, it's a crime, and the First Amendment has nothing to do with it? Do you disagree with that?

MR. COHEN: What I would say, your Honor, is that, where a defendant has a reasonable and fair belief that he is allowed to engage in fair comment, he is not acting with the

intent required under 1512. I think that's the appropriate way to think about it.

And what I keep coming back to, your Honor --

THE COURT: You think if two guys walk into a store and say to somebody, boy, this is an awfully nice store you have here, it would be a shame to see it burned to the ground, and, you know, maybe you ought to be nice to us.

Now, I suppose it could be said that those fellas walking into the store are just civic-minded people who are expressing their fair comment on the nice operation the man has and how terrible it would be if something happened, and yet, if the intent is to intimidate the man, the owner, it's a crime, and the fact that it was committed by speaking words doesn't give it any First Amendment protection at all.

Do you disagree with that?

MR. COHEN: I would say it depends on the facts, your Honor.

THE COURT: Well, what depends on the facts is what the intent was.

MR. COHEN: Correct. I agree with that. And on this record, which is what we are operating on, the showing has not been made. The example you just gave is the sort of example you would see in a case like *LaFontaine* and *Brown* and so forth.

THE COURT: That's an easy case.

MR. COHEN: I would agree with your Honor.

But what if, for example, and this is to pick up on your Honor's point, a journalist calls the defendant and says, you have been indicted, the government says you're guilty, what do you have to say? And the defendant says, well, I think not only do I think I'm innocent, I think someone else did it, and I think the witnesses against me are lying. That's *Gentile*. That's the Supreme Court case in *Gentile* which says that's permitted. And here we have a situation where the defendant fairly believed, in our view, that he was able to make these comments, at the time when it was not inconsistent with the protective order, it's not inconsistent with the bail conditions, it's not inconsistent with any order that had been issued by the Court. Obviously, it would be a different situation after last week when the Court had issued the temporary order, that would be a very different analysis.

So, your Honor, we submit that when you come back to what the cases say and what the rule says, the statute says -- we are talking about 3148, but 3142(f), as I'm sure your Honor knows, has a clear and convincing standard to show, essentially, the elements of witness tampering and, again, that there is no condition or combination of conditions that would assure the appearance -- we think the showing hasn't been made on this record, that the Court, as it has already, can craft conditions, which would be extending the temporary order to a permanent one. If there are other conditions the Court would

like to add, I am sure we would be amenable to it. But here we are two months before trial, your Honor, we want to be able to prepare for trial in a realistic, meaningful way. Getting sort of boilerplate platitudes about how everything can be converted to hard drives in a week, we are still getting discovery that was promised to us two months ago, so I am skeptical of that.

That was all I wanted to say, your Honor. I think if the Court would like further discussion on the First Amendment, Mr. Everdell is prepared to address that.

THE COURT: I don't think there is really a dispute about the First Amendment. I think the principles are clear. The question, as you rightly said, are the facts.

MR. COHEN: I know at the end of the last conference the Court said it was interested in the First Amendment issues.

THE COURT: Of course. It's a serious question, and I have spent a lot of time looking into it and reading all the material you submitted, none of which alluded to the problem of speech with a criminal intent. Quite a significant omission, if I may say so, especially whence it came. But there we are. I don't think I need anything further.

MR. COHEN: I agree with your Honor, it's fundamentally a fact determination. That on this record before the Court, given the two standards that the government is relying on, we are not even close to those cases, and the right way to address this is with appropriate conditions.

THE COURT: Thank you.

Anything else, Ms. Sassoon?

MS. SASSOON: Just briefly, your Honor.

I think the fact that the defendant here was more subtle in his methods than a mobster does not mean that the conduct was benign, that it wasn't designed to evade his bail conditions, and that it wasn't done with a criminal intent, especially here when some of the behavior tracked the defendant's MO while he was CEO of FTX, and that includes instructing his employees to delete their messages and telling multiple people a variation of, there is only downside to putting things in writing, especially when it comes to regulators. And then doing that same thing here of meeting in person with a reporter who he had active communication with by other methods. The clear inference is that he was continuing the same type of technique to avoid detection, which is not the behavior of someone who reasonably and fairly believes what he is doing is just fair comment, when he is secretively providing documents and not agreeing to be identified as the source for the article.

I also want to make clear that, while we think that this was done improperly and to intimidate Caroline Ellison a couple of months before trial, the Court need not find that this conduct itself was witness tampering under a criminal statute for detention to be appropriate here. One of the bases

that we argued for detention is 18 U.S.C. 3148, and if the Court deems the contact with Witness-1 to have been witness tampering under the probable cause standard, that triggers the rebuttable presumption. And it's enough for the Court to then conclude under either subsection that detention is appropriate, and one of those is that he is unlikely to abide his bail conditions.

And so, even if the Court concludes that the conduct with respect to Ms. Ellison falls short of *LaFontaine* or the other cases that you have been looking at, detention is still appropriate here given all of the evidence that this is not a defendant who is likely to abide by his bail conditions and who seems intent on interfering with the integrity of the trial.

THE COURT: Thank you.

MR. COHEN: Your Honor, if I might briefly respond?

THE COURT: Briefly.

MR. COHEN: Again, nothing in counsel's presentation changes the record. The defendant did not intend to tamper with witnesses, and the record doesn't support it under either the 3148 or 3142 standard. We get more allegations and no proffer of proof. As the Court knows, we have denied the allegations about deletion. We plan to contest that at trial.

THE COURT: I'm sorry. You have denied the allegations about?

MR. COHEN: Deletion. What counsel just said that he

was directing deletion of e-mails.

THE COURT: He was directing the use of an encrypted app and that it be set to delete everything after 30 days, isn't that true?

MR. COHEN: We dispute that that was done for the purpose of --

THE COURT: You don't dispute that it was done, right?

MR. COHEN: We also don't dispute that that very system was used by everyone in the company, including the lawyers.

THE COURT: That's neither here nor there. I am trying to get to the question of whether you acknowledge that at his direction that system was used, whether it was because he liked apple pie or for some other reason.

MR. COHEN: It doesn't quite work like that. Sometimes he would do it, sometimes others would do it.

THE COURT: Sometimes he would do what?

MR. COHEN: He would put on the delete function, sometimes others would.

THE COURT: And didn't he instruct people to use it?

MR. COHEN: Not for the purpose the government is suggesting.

THE COURT: I guess I am not going to get a straight answer, Mr. Cohen. I appreciate how candid you have been all through this proceeding. I admire the work you have done here,

to tell you the truth. But it's a simple question. May I have an answer?

(Counsel confers with defendant)

MR. COHEN: There is a distinction here that I'm not sure is relevant to the discussion we are having with the Court. But certainly the defendant would set some of his own settings to delete, and I think that's the Court's question.

THE COURT: No, it wasn't. It was included within the question, but the question went more broadly to people in the company.

MR. COHEN: He disputes that.

THE COURT: At all. He never gave such direction?

MR. COHEN: He disputes that, your Honor.

Lastly, in terms of the last point that counsel made, that was under a 3148 factor about unlikely to abide by conditions. And I think there is a good record here of the defendant abiding by very complex conditions. In fact, the reason we have this instant dispute presented to the Court is because the conditions were followed.

So, again, we submit that the Court can construct a set of conditions that would be the least restrictive alternative to assure the safety of a person or the community.

THE COURT: Thank you.

Ms. Sassoon, am I incorrect in recalling that earlier in these proceedings about bail, over many months, there was a

representation or a proffer not only that the defendant had instructed others in the company to use the delete function, but also made a comment to the effect that legal cases are built on documents and that's why you should do it, or words to that effect?

MS. SASSOON: Yes, your Honor. And, as the Court and the parties know, at a bail hearing you can proceed by proffer. I am surprised to hear defense counsel dispute that this was a company-wide policy that the defendant instituted. And if the Court thought it was relevant or important, we could provide more documentation of that.

For purposes of today, I will say we previously made that proffer to the Court, and just yesterday we were meeting with a different witness, who also stated that the defendant instituted this auto-deletion policy and indicated to him that it was only downside if their company communications were in writing because regulators could review them. And that's in sum and substance what was proffered to us.

And we have also seen, in the evidence and records in this case, that around August 2021, these auto-delete features were instituted on company communications, and it's our understanding from our investigation that this was a policy instituted by the defendant.

THE COURT: Mr. Cohen, does your client dispute the substance of the remark attributed to him about there being

only downside if communications were in writing?

MR. COHEN: Your Honor, I think what my client would say is a couple of things on that. That what he said, and witnesses may be misremembering it, is don't write things that could be taken out of context, which is very different from the way that it's being presented in the court. That's what we thought then, that's what we thought at the time.

And as your Honor may recall, there was some litigation about us trying to get access to the files from the outside law firm because the policies, at least our client's understanding, and there's billing records to confirm this, the policies about deletion and so forth were reviewed by an outside and an inside firm. So we just have a very different view of this evidence, your Honor, and obviously that's for trial.

THE COURT: Okay. Thank you.

I am prepared to rule on this now, and it may take more than five minutes.

As we all know, the defendant in this case is charged with perpetrating a multibillion dollar fraud relating to his operation of cryptocurrency companies that he founded and controlled, FTX and Alameda. He was arrested in the Bahamas on December 12, 2023 and extradited to the United States on or about December 21. He initially was released on a $250 million personal recognizance bond, subject to conditions, including

detention in his parents' home in California.

At the same time, the government announced that Caroline Ellison and Gary Wang both had pleaded guilty in this case and were cooperating with the government. Both formerly were senior executives of one or both of the defendant's companies, and perhaps others, and in the case of Ms. Ellison, formerly had been in one or more intimate relationships with the defendant.

Over the ensuing months, the better part of a year by this time, the conditions of defendant's release have been tightened, at least twice that I remember, and probably more times, in response to government concerns that the defendant was tampering or might tamper with witnesses or engage in other troublesome conduct.

On July 20, the government again moved to tighten the conditions of the defendant's release, at that time by limiting extrajudicial statements by the parties and witnesses that were likely to interfere with a fair trial. Its focus was largely on the defendant's alleged leak of private materials of Ms. Ellison to the New York Times.

Also, following some concessions by the defendant and the receipt by the government of additional information, basically relating to the frequency of the defendant's contacts with media, but also others, the government, on the 26th of July, orally moved to revoke the defendant's bail. Since then

I have received submissions by members of the media and from a well-known constitutional scholar who submitted views in this case in the unusual form of an affidavit rather than an amicus curiae brief. But all of these were addressed to the contention that limitations on extrajudicial statements would violate the First Amendment. I have since had rather full briefing and heard argument.

Now, I am going to focus on Section 3148(b), which provides, in relevant part, that a judge shall enter an order of revocation and detention if after a hearing the judge finds:

First, that there is either probable cause to believe that the person has committed a federal, state or local crime while on release, or that there is clear and convincing evidence that the person has violated any other condition of release; and in addition finds either, based on factors set forth elsewhere in the Bail Reform Act, there is no condition or combination of conditions of release that would assure that the person will not flee or pose a danger to the safety of any other person or the community, or, alternatively, that the person is unlikely to abide by any condition or combination of conditions of release.

If there is probable cause to believe that a defendant, while on release, committed a felony, then -- and I quote -- "a rebuttable presumption arises that no condition or combination of conditions will assure that the person will not

pose a danger to the safety of any other person or the community." And I refer to 18 U.S.C. 3148(b) and the *LaFontaine* case to which counsel have referred.

The government's position is that the record in this case now establishes that there is probable cause to believe that the defendant committed attempted witness tampering and/or attempted obstruction of justice, either of which would be a felony, and I am going to address witness tampering.

The relevant statute is 18 U.S.C., Section 1512(b), which provides in substance, and in relevant part, that whoever knowingly uses intimidation, threatens or corruptly persuades another person, or attempts to do so, with intent to influence, delay, or prevent the testimony of any person in an official proceeding is guilty of a felony.

I have previously written, following the Second Circuit's decision -- namely, *LaFontaine* -- that nonviolent witness tampering and obstruction poses a danger to the community and that the risk of such activities in an appropriate case would support pretrial detention. *United States v. Stein*, 2005 WL 8157371, at *2 (S.D.N.Y. Nov. 14, 2005). Probable cause exists when there is a practical probability that the evidence supports a finding that the defendant has committed a crime while on bail.

Now, let's look at the factual basis the government relies on. On January 15, the defendant sent the general

counsel of FTX US, who has been referred to as Witness-1, the following message via Signal, an encrypted communications medium: "Hey, I know it's been a whole while since we have talked, and I know things have ended up on the wrong foot. I would really love to reconnect and see if there is a way for us to have a constructive relationship, use each other as resources when possible, or at least vet things with each other. I would love to get on a phone call sometime soon and chat."

The defendant has proposed a quite benign reading of that message. It's one I didn't share at the beginning, and I don't share it now.

The message is addressed to Witness-1 and seeks reconciliation of an apparently damaged personal relationship.

Now let's focus on the time period. The previous communications, at least written communications, between Mr. Bankman-Fried and Witness-1 had been before the disaster really struck publicly, before the defendant was indicted, before Ms. Ellison and Mr. Wang were known to be cooperating with the government and pleading guilty. Witness-1 says in this January 15 message -- excuse me, Mr. Bankman-Fried says, "The relationship was left in a bad place and we haven't talked for quite a long time," suggesting that they hadn't been in contact since before, to use a colloquial phrase, it all hit the fan. And the message proposes that the defendant and Witness-1 "vet

things with each other."

Now, this isn't the time for a final after-trial determination about what all of this meant. It's a time for assessing probable cause. The message, in my opinion, in its entirety seems to be an invitation for Witness-1 to get together with Mr. Bankman-Fried so that his views and recollections would be on the same page with the defendant's version of events, and in that way make the relationship between the two of them more constructive. In the past, I referred to this as probably being an effort to have the two of them sing out of the same hymn book for their mutual benefit, and I rather suspect that as of January 15, with indictments of some top people in the company already having come down, Mr. Bankman-Fried was wondering whether Witness-1 was wondering whether Witness-1 might be on the list in the future.

Now, Mr. Cohen, and I meant every good thing I said when I had an exchange with him before, he's a wonderful lawyer and he's doing a wonderful job, has a different view. He says, when I reached that view at the beginning of February, that I didn't have the full context of these communications, which he says show that this Signal message to Witness-1 was benign and when you consider it all together, it doesn't support probable cause. I don't agree with that.

Mr. Cohen submits evidence that Mr. Bankman-Fried and Witness-1 exchanged messages in mid-November, but that was in a

different world. That was almost two months before this January 15 message. While it may be true historically that the first of these messages between the two individuals was made by Witness-1, that first message happened long before the time period in which the January 15 message was written, and the January 15 message, obviously, by its own terms, reinitiated the communication between them that had lapsed for some time.

So I don't buy the argument that it was Witness-1 who reached out first to encourage the defendant to align his efforts with Witness-1, except in one maybe narrow sense. It was to everybody's interest, once Mr. Bankman-Fried had been indicted, once the companies had gone bust, to support customer assets and recover as much as could be recovered. That all stood potentially to benefit everybody.

So the January 15 conversation, or overture, or message, to be more precise, comes about in a radically different context than the ones on which the defendant relies as showing that I took this out of context. I didn't at all. And it's his evidence that proves it.

There is no evidence before me of any communication between Witness-1 and the defendant following the defendant's arrest or even after mid-November until January 15.

The second point is this. The defense relies on the fact that Mr. Bankman-Fried communicated with John Ray, who once Mr. Bankman-Fried was out of these companies was the

receiver or liquidator, or whatever the magic term is under Bahamian law, of FTX, and with a partner at Sullivan & Cromwell, which is representing the FTX debtors I believe.

Now, first of all, there is a vast difference between John Ray and Sullivan & Cromwell, on the one hand, and Witness-1 on the other. Witness-1 is a witness to the charged crimes. Mr. Ray and Sullivan & Cromwell, so far as this record shows, were not. The interest of Ray and Sullivan & Cromwell was to marshall the assets. Mr. Bankman-Fried evidently thought helping them do that, to the extent he might accomplish that, would help Mr. Bankman-Fried, but it wasn't because they were going to help him as witnesses in this case.

Secondly, unlike Mr. Bankman-Fried's messages to Mr. Ray and Sullivan & Cromwell, his message to Witness-1 referred to Bankman-Fried, on the one hand, and Witness-1 "using each other as resources" and "vetting things with each other." Nothing like that was said to Ray and Sullivan & Cromwell. Those are things that are said between people with a common interest in a litigation situation like this one.

Finally, in Mr. Bankman-Fried's messages to Mr. Ray, he copied his attorneys. He did not copy any attorneys on the message to Witness-1.

I can imagine that a jury conceivably might conclude that the message to Witness-1 was not what it now appears to have been. But in my mind there is a practical probability

that the message was an attempt to have Witness-1 and the defendant, to use the phrase I used in February, sing out of the same hymn book, and it was an attempt at witness tampering.

I come to the more recent event, which relates to the New York Times July 20, 2023 article, titled "Inside the Private Writings of Caroline Ellison, Star Witness in the FTX case." The article quotes from personal diaries and other private documents written by Ms. Ellison. They describe her feelings and insecurities with respect to her work at Alameda and her personal relationship with the defendant. The article doesn't state the source or sources of the quoted materials, the documents. It now is undisputed that the defendant spoke to at least one of the New York Times authors many, many times in the period preceding the publication and, on the virtual eve of the publication of the article, entertained that reporter at his parents' home in Palo Alto, California, and showed the reporter allegedly a small portion of Ms. Ellison's private writings. Those writings portrayed Ms. Ellison in an unfavorable light. I don't know what else was shown. I don't know what else was said. The defense has not proffered that. The government has not either, presumably because they don't have it.

Based on the government's public filings and statements in court, it had been known widely, at least since the defendant was presented in this court in November, months

before the Times article was published, that Ms. Ellison would be an important witness at the defendant's trial. It is the government's position that -- and I am quoting the government here -- "by sharing Ms. Ellison's private writings about her insecurities and heartache with the hope that it would be published in the New York Times, the defendant's conduct was intended, at least in part, to harass Ellison and to hinder, prevent or dissuade her from testifying, or to influence the testimony of Ellison, and to influence or prevent others by creating the specter that their most intimate business is at risk of being reported to the press, and thus to influence prospective jurors."

Now, I lost where I should have closed that quote. I will fix that in the transcript. But the substance of what I just read out is the substance of the government's position, which in any case is already a matter of public record because I am taking it out of a publicly filed document.

Now, the defendant's main response has been that the defendant has a First Amendment right to communicate with the press, and certainly the various press organizations that have been heard from on my docket take the same position.

I am exceptionally mindful of the defendant's First Amendment rights, and there isn't any question that having frequent contact with the press on its own, and for no malign purpose, does not constitute obstruction or witness tampering

or anything else criminal. But the First Amendment arguments, as I think is clear from my colloquy with counsel, ignore a very well established principle that has been articulated in a line of Supreme Court decisions going back to a case called *Giboney v. Empire Storage*, 336 U.S. 490 (1949), decided in the 40s. The Supreme Court there said, "It has never been deemed an abridgment of freedom of speech or press to make a course of conduct illegal merely because the conduct was in part initiated, evidenced, or carried out by means of language, either spoken, written or printed." *Id.* at 503. And lest anybody think I am relying on ancient legal history from the last century, the Supreme Court repeated that point within the last couple of weeks in *United States v. Hansen*, in which it held that "speech intended to bring about a particular unlawful act has no social value" and therefore "is unprotected."

Thus, a defendant's speech is not protected to the extent that it is intended to bring about a crime; where such an intent is present, the speech becomes part of a crime. And that's precisely why my hypothetical of two thugs going into a grocery store and making the statement that I related to counsel during the colloquy is a crime. The purpose of that is to extort the grocery store. And the fact that the extortion is carried out by spoken words and, indeed, no physical actions other than being there, doesn't matter.

It's worth noting also that a defendant may be

convicted even of a specific intent crime as long as the defendant acted out of mixed motives, as long as one of those motives satisfies the necessary criminal intent. I cite, for example, *United States v. Technodyne*, 753 F.3d 368, at 365.

So the question boils down to whether there is a practical probability that Mr. Bankman-Fried was motivated even in part by a desire to influence or intimidate Ms. Ellison and/or other witnesses.

Now, the defense has made a lot of the fact that he has gotten a lot of bad press and he is entitled to try to repair his reputation. Fair enough. I assume for the purposes of this discussion that that was a material part of his motivation in all of his speaking out to the press. But I find that there was a practical probability that with respect to the communication with Witness-1 and Ms. Ellison, and quite likely others, whose names we don't even know, or at least I don't at this point, was intended also, even if in modest part, to influence those people, to have them back off, to have them hedge their cooperation with the government in the case of those who have agreed to cooperate.

And there are other circumstances that support my judgment that there is probable cause to believe he acted at least in part with that motive. I find it significant that the defendant, rather than providing copies of the excerpts from Ellison's private papers to a reporter with whom he had been in

close touch, he had the reporter come to his home, and didn't give him copies; he let the reporter read it and take notes from it. We know he took notes because there are quotes in the New York Times that are identical to the language in those documents. It was a way, in his view, of doing this in a manner in which he was least likely to be caught; not impossible to be caught, least likely. He was covering his tracks.

Also, the content of these documents in some respects tends to support the conclusion they are extremely, in some parts, personal and intimate. Those parts are relationship oriented, not business, commercially or legally oriented, except -- and I don't say that's universally true of the content, but it is true of parts of the content -- they are something that someone who has been in a relationship, or is in a relationship, would be very unlikely to share with anybody, lest the New York Times, except to hurt, discredit, and frighten the subject of the material. Those views are not essential to my conclusion, but I believe they tend to support it.

In view of the evidence, specifically the proffers presented by both sides, to the extent each is uncontradicted, my conclusion is that there is probable cause to believe that the defendant has attempted to tamper with witnesses at least twice within the meaning of 18 U.S.C., Section 1512(b). I am

speaking of Witness-1 and Ms. Ellison.

Accordingly, under Section 3148, there is a rebuttal presumption that no condition or combination of conditions will assure that Mr. Bankman-Fried will not pose a danger to the safety of any other person or his community if he remains at liberty. It's well established in prior cases that the safety of the community includes protecting the community against the consequences of witness tampering.

Mr. Cohen admirably argues that the presumption has been rebutted. I disagree. He has offered up a gag order on all communications with the press.

Now, it's not, strictly speaking, exactly that broad, but the problems are multiple with such a thing. I don't have the text of the temporary order before me. Maybe, Andy, you can put it on my computer screen. Here it is.

The temporary order that I signed on July 26, for one thing, has a carve-out from media contacts for assertions of innocence or references to information that is contained either in publicly filed court filings or transcripts of court proceedings in the case. So right away, even if the gag on communications with the media were in effect long term, it doesn't really stop all communications with the media. It leaves one fighting about what are references to information contained in various kinds of documents.

More broadly, the operative part, the first and most

significant part of the previous order, would prohibit him, if I were to adopt this long-term, from communicating with any public communications media anything about the case. In this day and age, I don't know what public communications media are, and I don't think anybody else does either. Is that anybody who posts on Instagram? How about people who comment on the Washington Post opinion pieces? It's arguably anybody who wants to be included. Moreover, judging by the submissions I have received from the media, even if I were to go along with this despite the problems, I'd rather imagine we would be in for collateral litigation of some moment. I don't think that it's a workable solution longer term, particularly with someone who has shown a willingness and desire to risk crossing the line in an effort to get right up to it, no matter where the line is.

It's certainly true, for example, that his use of the VPN to watch a football game over an account on which he wasn't entitled to watch it from the United States didn't violate any of his bail conditions. It wasn't even a big deal in and of itself, but there it is. He subscribed to this service from the Bahamas, then used a VPN to log into it as if he were in the Bahamas, when he was sitting in Palo Alto and could have watched the game on public television. It says something about the mindset. The means of sharing the documents with the New York Times says to me something about the mindset. And I think

he has already, without violating any other bail condition, save that he not commit another crime, has gone up to the line over and over again.

So all things considered, I am going to revoke bail, but I have a couple of other things to say. I fully appreciate everything that Mr. Cohen said last time we were together and today concerning the desirability of continuing trial preparation without the defendant being incarcerated. It's not one of the factors that I am obliged or, indeed, arguably even permitted by the statute to consider here, but I have considered it. I was a trial lawyer in my youth and I know what Mr. Cohen is talking about, and I appreciate it. I don't think, however, that the revocation of bail is quite the insurmountable problem that has been made out.

Now, Ms. Sassoon spoke about the possibility of detention in the Putnam County Correctional Facility, and that internet access of some kind would be available there. And I don't know whether that's actually doable. And I think if the government has any such thing in mind, they better talk to the marshal for this district who may have views on this subject. And that's the first thing. I am not opposed to that. I am not taking any position on it. But I am more focused on the possibility that he will be detained pending trial at the MDC, which is not on anybody's list of five star facilities.

That said, I understand that he could have a dedicated

laptop at the MDC, which would be retained in the visiting room area, to which he would have access very liberally -- nine, ten, eleven, twelve hours a day, I'm not sure exactly. He would be permitted, as I understand it, to retain optical disks and hard drives in his housing area and take them with him when he goes to the laptops. I understand that these various databases could be put on portable disks or drives. I am not an expert on how long it would take. I imagine the necessary software could be put on the laptop, but I'm not an expert on that.

I am also aware that the trial date is coming before too very long, and there is a remedy of last resort here if the situation can't be worked out appropriately wherever he is detained. And that is Section 3142(i) of the Bail Reform Act, which provides in part: The judicial officer may by subsequent order permit the temporary release of the person, i.e., the defendant, in the custody of the United States marshal, or another appropriate person, to the extent that judicial officer determines such release to be necessary for preparation of the person's defense or for another compelling reason.

Now, what that says to me is that, on an appropriate showing, I could entertain -- I am not promising what I would do with it, but I could entertain -- an application for Mr. Bankman-Fried to spend time, possibly significant time as trial approaches, in counsel's office, under supervision and under

appropriate safeguards, so that any problems with the correctional situation could be avoided for significant periods of time.

Ms. Sassoon.

MS. SASSOON: Yes, your Honor.

In preparation for this hearing, the government also communicated with the MDC to understand the discovery access, and your Honor is correct that they have dedicated desktops as well as situations where they allow a laptop for discovery review. The reason why the government is proposing Putnam is because, given where we are in the case and the amount of discovery that has been produced to date given that the defendant was not detained at the outset, the time it would take to load the discovery we have today onto a laptop would take at least weeks, based on our conversations with our IT folks, and we don't have complete visibility at this point into how readable or searchable that data would be in this format, which is why we are proposing Putnam, where instead he could have more immediate access to the discovery through the defense's Relativity database and be able to review the discovery through the internet in the searchable format.

My understanding in terms of the marshal's willingness to accommodate this is that Putnam would have room for the defendant, that the FBI would assist in transporting him there, but that for trial itself the defendant would have to be at the

MDC or somewhere closer, because to transport him here for trial each day I think would be several hours each way. At that point I think the discovery issues will be more manageable, in that the defendant has had these many months to review discovery, he will have the time in advance of trial to review discovery, and by the time trial itself is actually starting, we will have a universe of trial exhibits that could be easily put onto a drive and accessed and reviewed at the MDC given its expansive hours for discovery review and trial preparation.

One last thing. With respect to 3142(i), I know we are not at that crossroads yet. My understanding from preliminary conversations is there are some obstacles toward arranging to bring a defendant to a place like an attorney's office from a security standpoint. But if that is something that the Court wishes to explore, we can get additional information about that.

THE COURT: I think it's sufficient that if we get to the point that Mr. Cohen feels he needs something like that, first explore it, explore it with Mr. Cohen, and if I need to do something, I will do it, provided I am convinced that it's safe and efficacious and so forth.

So bail is revoked. The defendant is remanded.

Is there anything else, Mr. Cohen?

MR. COHEN: Yes, your Honor, a couple of things.

Obviously, we intend to appeal this. So I believe we are going to need a written order from your Honor so we have something to appeal from. I don't know if the Court will be issuing one.

THE COURT: Look, you will have the transcript overnight, I'm sure, right? And I can do a short form order before I leave the premises today.

MR. COHEN: Also, your Honor, we have an application to stay your Honor's ruling today pending appeal.

THE COURT: Ms. Sassoon.

MS. SASSOON: May I have a moment, your Honor.

We oppose that, your Honor.

THE COURT: You want to address it? Who wants to speak first?

MR. COHEN: Your Honor, we submit that there are very important issues here relating to a discussion we have been having -- let me go over here -- a discussion we have been having about application of 3148 and 3142(f)(2)(B). We have an unusual --

THE COURT: You're aware that I didn't rely on 3142.

MR. COHEN: I understand, your Honor.

We have an unusual situation factually, and we think this is something that the Circuit will take on its motion calendar. We won't docket it as a normal appeal so we can have resolution quickly. And not to repeat the argument, we

understand the Court has ruled, but we think there are novel issues here about the application of 3148 and its interplay with 1512, as well as the First Amendment context. Obviously, we respectfully disagree and want go to the Circuit and believe it can be done promptly. There has been no allegation of any conduct by the defendant since your Honor issued the temporary order which was more than a week ago. So we are not talking about a long period of time. So we would ask that the Court stay today's ruling and allow us time to appeal to the Circuit.

THE COURT: Thank you.

MS. SASSOON: Your Honor, this case does not appear to involve a novel application of 3148. Your Honor found not one, but two instances of probable cause that the defendant committed a felony. The order would have been supported by one of those alone and by the other indications of the defendant going up against the line of his bail conditions. And given that finding by the Court, there is a lot of reason for concern that if there is an interim period of several days before the defendant is detained, who knows what kind of mischief he can accomplish in that time with the will to do so. And so we would oppose.

THE COURT: Mr. Cohen, I respect your application. I would have made it myself if I were in your shoes. You know that. But I am going to deny it, and I am going to deny it because I disagree that there is anything novel about this

other than a factual issue. And the factual issue, and I think our colloquy established that everybody agreed on this, was whether the proffered facts that are not in dispute give rise to probable cause; whether a reasonable person viewing it all would consider it practically likely that the defendant had attempted to tamper. That is not a question of law. It has nothing to do with the First Amendment. I think by the end of the discussion today we all agreed on what the First Amendment had to say about this. 3142 is not involved in this. I didn't rely on it at all. And 3148 is clear.

You have simply an appeal in which you are going to argue that it was unreasonable for me to find the probability given the facts. You have a right to take that up, but I don't think the likelihood of success on that is very high, recognizing always that I never think back when my rulings are appealed, and once in a while I find out otherwise. But that's their job, and I do mine, and we all understand that. And if I thought there really was a substantial issue, I would give you what you asked, but I don't.

Okay. The defendant is remanded.

Thank you, all.

MS. SASSOON: One point just for the record.

In the government's view, this should not change anything about the trial schedule or the pretrial deadlines, but we do have a number of deadlines on Monday and Wednesday of

next week. So I want to confirm that the government intends to stick by those deadlines and inquire if anyone has a different view.

MR. COHEN: We would like to be able to come back to your Honor on that.

THE COURT: Your deadline is Monday?

MS. SASSOON: For motions *in limine* and Rule 404(b) notice, your Honor.

MR. COHEN: We are going to make the Monday deadline. I didn't know that's what counsel was referring to.

THE COURT: So you are going to make the Monday deadline.

And then the next deadline after Monday is when?

MS. SASSOON: Wednesday for expert notice and defense notice on advice of counsel and mental defect.

MR. COHEN: We are going to make that deadline as well, your Honor. I didn't know if counsel meant other deadlines beyond that which may be impacted by an appeal and so forth.

THE COURT: So I think we are all right at least for a few days.

MR. COHEN: Yes.

MS. SASSOON: Part of the concern here is our motions are going to disclose information about the trial. Again, I see no reason why this should prompt a request for a lengthy

trial adjournment, but in the event that one is anticipated --

THE COURT: Well, if one is anticipated, I better find out now.

Mr. Cohen.

MR. COHEN: Your Honor, we are going to wait and see what we receive from the government, but at the moment we have no application to adjourn the trial date.

THE COURT: Okay.

(Adjourned)

have emphasized that in court and in our papers. We don't view this as a First Amendment issue given the means by which the defendant tried to do this, which we consider amounting to witness intimidation and tampering.

THE COURT: So the line, if I understand you correctly, is where the intent, in whole or in part, is to influence, intimidate, or various other things a witness, yes?

MS. SASSOON: I think it's the intent, and I think that intent is clear here. But I also think the substance of the communication matters too. If he came out and said, I'm innocent or I dispute the allegations in the indictment, that's one type of communication. Whereas, if the substance of the communication can only be understood as trying to influence the public's opinion by discrediting and harassing a witness, that's both part of the witness intimidation, but also part of what the rules, in governing the conduct of the attorneys at the very least, consider tainting the jury and making improper communication.

THE COURT: The conduct informs one's view of the intent, that is, the substance of the communication, right?

MS. SASSOON: Yes.

In our view, the defense has not really engaged with their view of what the least restrictive conditions should be if the Court accepts the government's view of the evidence. They have raised concerns about discovery access in the event

thousands about the defendant.

THE COURT: And there is no record at all, other than the three or so pages you have turned over, of what passed between your client and the reporter in that meeting, or in whatever it was, or of preceding conversations on the telephone, save whatever notes the reporter may have, which he is not about to turn over without going from here to the Supreme Court and back.

MR. COHEN: Right.

But, stepping back, there was no gag order in the original bail conditions or any of the modifications either before the magistrate judge or before your Honor. A defendant, as we have discussed last time and in our submission, is permitted under the First Amendment to speak about his case, to speak about his view of his case. He is not limited, as counsel just suggested, to saying, I think I'm innocent, that's it.

THE COURT: Of course not. But do you disagree that the law is that once the communication is undertaken as part of or with the intent to intimidate or influence a witness, it's a crime, and the First Amendment has nothing to do with it? Do you disagree with that?

MR. COHEN: What I would say, your Honor, is that, where a defendant has a reasonable and fair belief that he is allowed to engage in fair comment, he is not acting with the intent required under 1512. I think that's the appropriate way

At the same time, the government announced that Caroline Ellison and Gary Wang both had pleaded guilty in this case and were cooperating with the government. Both formerly were senior executives of one or both of the defendant's companies, and perhaps others, and in the case of Ms. Ellison, formerly had been in one or more intimate relationships with the defendant.

Over the ensuing months, the better part of a year by this time, the conditions of defendant's release have been tightened, at least twice that I remember, and probably more times, in response to government concerns that the defendant was or might tamper with witnesses or engage in other troublesome conduct.

On July 20, the government again moved to tighten the conditions of the defendant's release, at that time by limiting extrajudicial statements by the parties and witnesses that were likely to interfere with a fair trial. Its focus was largely on the defendant's alleged leak of private materials of Ms. Ellison to the New York Times.

Also, following some concessions by the defendant and the receipt by the government of additional information, basically relating to the frequency of the defendant's contacts with media, but also others, the government, on the 26th of July, orally moved to revoke the defendant's bail. Since then I have received submissions by members of the media and from a

community." And I refer to 18 U.S.C. 3148(b) and the *LaFontaine* case to which counsel have referred.

The government's position is that the record in this case now establishes that there is probable cause to believe that the defendant committed attempted witness tampering and/or attempted obstruction of justice, either of which would be a felony, and I am going to address witness tampering.

The relevant statute is 18 U.S.C., Section 1512(b), which provides in substance, and in relevant part, that whoever knowingly uses intimidation, threatens or corruptly persuades another person, or attempts to do so, with intent to influence, delay, or prevent the testimony of any person in an official proceeding is guilty of a felony.

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United States v. Stein, 2005 WL 815771, at *2 (S.D.N.Y. Nov. 14, 2005)

Now, let's look at the factual basis the government relies on. On January 15, the defendant sent the general counsel of FTX US, who has been referred to as Witness-1, the following message via Signal, an encrypted communications

medium: "Hey, I know it's been a whole while since we have talked, and I know things have ended up on the wrong foot. I would really love to reconnect and see if there is a way for us to have a constructive relationship, use each other as resources when possible, or at least vet things with each other. I would love to get on a phone call sometime soon and chat."

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Now let's focus on the time period. The previous communications, at least written communications, between Mr. Bankman-Fried and Witness-1 had been before the disaster really struck publicly, before the defendant was indicted, before Ms. Ellison and Mr. Wang were known to be cooperating with the government and pleading guilty. Witness-1 says in this January 15 ~~e-mail~~ message – excuse me, Mr. Bankman-Fried says, "The relationship was left in a bad place and we haven't talked for quite a long time," suggesting that they hadn't been in contact since before, to use a colloquial phrase, it all hit the fan. And the message proposes that the defendant and Witness-1 "vet things with each other."

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Mr. Cohen submits evidence that Mr. Bankman-Fried and Witness-1 exchanged messages in mid-November, but that was in a different world. That was almost two months before this January 15 message. While it may be true historically that the

first of these messages between the two individuals was made by Witness-1, ~~the~~ first ~~of the~~ messages happened long before the time period ~~that~~ the January 15 message was written, and the January 15 message, obviously, by its own terms, reinitiated the communication between them.

So I don't buy the argument that it was Witness-1 who reached out first to encourage the defendant to align his efforts with Witness-1, except in one maybe narrow sense. It was to everybody's interest, once Mr. Bankman-Fried had been indicted, once the companies had gone bust, to support customer assets and recover as much as could be recovered. That all stood potentially to benefit everybody.

So the January 15 conversation, or overture, or message, to be more precise, comes about in a radically different context than the ones on which the defendant relies as showing that I took this out of context. I didn't at all. And it's his evidence that proves it.

There is no evidence before me of any communication between Witness-1 and the defendant following the defendant's arrest or even after mid-November until January 15.

The second point is this. The defense relies on the fact that Mr. Bankman-Fried communicated with John Ray, who once Mr. Bankman-Fried was out of these companies was the receiver or liquidator, or whatever the magic term is under Bahamian law, of FTX, and with a partner at Sullivan &

Cromwell, which is representing the FTX debtors I believe.

Now, first of all, there is a vast difference between John Ray and Sullivan & Cromwell, on the one hand, and Witness-1, on the other. Witness-1 is a witness to the charged crimes. Mr. Ray and Sullivan & Cromwell, so far as this record shows, were not. The interest of Ray and Sullivan & Cromwell was to marshall the assets. Mr. Bankman-Fried evidently thought helping them do that, to the extent he might accomplish that, would help Mr. Bankman-Fried, but it wasn't because they were going to help him as a witness in this case.

Secondly, unlike Mr. Bankman-Fried's messages to Mr. Ray and Sullivan & Cromwell, his messages to Witness-1 referred to Bankman-Fried, on the one hand, and Witness-1 "using each other as resources" and "vetting things with each other." Nothing like that was said to Ray and Sullivan & Cromwell. Those are things that are said between people with a common interest in a litigation situation like this one.

Finally, in Mr. Bankman-Fried's messages to Mr. Ray, he copied his attorneys. He did not copy any attorneys on the message to Witness-1.

I can imagine that a jury conceivably might conclude that the message to Witness-1 was not what it now appears to have been. But in my mind there is a practical probability that the message was an attempt to have Witness-1 and the defendant, to use the phrase I used in February, sing out of

the same hymn book, and it was an attempt at witness tampering.

I come to the more recent event, which relates to the New York Times July 20, 2023 article, titled "Inside the Private Writings of Caroline Ellison, Star Witness in the FTX case." The article quotes from personal diaries and other private documents written by Ms. Ellison. They describe her feelings and insecurities with respect to her work at Alameda and her personal relationship with the defendant. The article doesn't state the source or sources of the quoted materials, the documents. It now is undisputed that the defendant spoke to at least one of the New York Times authors many, many times in the period preceding the publication, and on the virtual eve of the publication of the article, entertained that reporter at his parents' home in Palo Alto, California, and showed the reporter allegedly a small portion of Ms. Ellison's private writings. Those writings portrayed Ms. Ellison in an unfavorable light. I don't know what else was shown. I don't know what else was said. The defense has not proffered that. The government has not either, presumably because they don't have it.

Based on the government's public filings and statements in court, it had been known widely, at least since the defendant was presented in this court in November, months before the Times article was published, that Ms. Ellison would be an important witness at the defendant's trial. It is the

very well established principle that has been articulated in a line of Supreme Court decisions going back to a case called *Giboney v. Empire Storage*, decided in the 30s. The Supreme Court there said, "It has never been deemed an abridgment of freedom of speech or press to make a course of conduct illegal merely because the conduct was in part initiated, evidenced, or carried out by means of language, either spoken, written or printed." And lest anybody think I am relying on ancient legal history from the last century, the Supreme Court repeated that point within the last couple of weeks in *United States v. Hansen*, in which it held that "speech intended to bring about a particular unlawful act has no social value" and therefore "is unprotected."

Thus, a defendant's speech is not protected to the extent that it is intended to bring about a crime; where such an intent is present, the speech becomes part of a crime. And that's precisely why my hypothetical of two thugs going into a grocery store and making the statement that I related to counsel during the colloquy is a crime. The purpose of that is to extort the grocery store. And the fact that the extortion is carried out by spoken words and, indeed, no physical actions other than being there, doesn't matter.

It's worth noting also that a defendant may be convicted even of a specific intent crime as long as the defendant acted out of mixed motives, as long as one of those

from it. We know he took notes because there are quotes in the New York Times that are identical to the language in those documents. It was a way, in his view, of doing this in a manner in which he was least likely to be caught; not impossible to be caught, least likely. He was covering his tracks.

Also, the content of these documents in some respects tends to support the conclusion they are extremely, in some parts, personal and intimate. ~~They~~ those parts are relationship oriented, not business, commercially or legally oriented, except -- and I don't say that's universally true of the content, but it is true of parts of the content -- they are something that someone who has been in a relationship, or is in a relationship, would be very unlikely to share with anybody, lest the New York Times, except to hurt, discredit, and frighten the subject of the material. Those views are not essential to my conclusion, but I believe they tend to support it.

In view of the evidence, specifically the proffers presented by both sides, to the extent each is uncontradicted, my conclusion is that there is probable cause to believe that the defendant has attempted to tamper with witnesses at least twice within the meaning of 18 U.S.C., Section 1512(b). I am speaking of Witness-1 and Ms. Ellison.

Accordingly, under Section 3148, there is a rebuttal presumption that no condition or combination of conditions will

assure that Mr. Bankman-Fried will not pose a danger to the safety of any other person or his community if he remains at liberty. It's well established in prior cases that the safety of the community includes protecting the community against the consequences of witness tampering.

Mr. Cohen admirably argues that the presumption has been rebutted. I disagree. He has offered up a gag order on all communications with the press.

Now, it's not, strictly speaking, exactly that broad, but the problems are multiple with such a thing. I don't have the text of the temporary order before me. Maybe, Andy, you can put it on my computer screen. Here it is.

The temporary order that I signed on July 26, for one thing, has a carve-out from media contacts for assertions of innocence or references to information that is contained either in publicly filed court filings or transcripts of court proceedings in the case. So right away, even if the gag on communications with the media were in effect, long-term it doesn't really stop all communications with the media. It leaves one fighting about what are references to information contained in various kinds of documents.

More broadly, the operative part, the first and most significant part of the previous order, would prohibit him, if I were to adopt this long-term, from communicating with any public communications media anything about the case. In this

day and age, I don't know what public communications media are, and I don't think anybody else does either. Is that anybody who posts on Instagram? How about people who comment on the Washington Post opinion pieces? It's arguably anybody who wants to be included. Moreover, judging by the submissions I have received from the media, even if I were to go along with this despite the problems, I'd rather imagine we would be in for collateral litigation of some moment. I don't think that it's a workable solution longer term, particularly with someone who has shown a willingness and desire to risk crossing the line in an effort to get right up to it, no matter where the line is.

It's certainly true, for example, that his use of the VPN to watch a football game over an account ~~that~~ on which he wasn't entitled to watch it ~~over~~ from the United States didn't violate any of his bail conditions. It wasn't even a big deal in and of itself, but there it is. He subscribed to this service from the Bahamas, then used a VPN to log into it as if he were in the Bahamas, when he was sitting in Palo Alto and could have watched the game on public television. It says something about the mindset. The means of sharing the documents with the New York Times says to me something about the mindset. And I think he has already, without violating any other bail condition, save that he not commit another crime, has gone up to the line over and over again.

would be permitted, as I understand it, to retain optical disks and hard drives in his housing area and take them with him when he goes to the laptops. I understand that these various databases could be put on portable disks or drives. I am not an expert on how long it would take. I imagine the necessary software could be put on the laptop, but I'm not an expert on that.

I am also aware that the trial date is coming before too very long, and there is a remedy of last resort here if the situation can't be worked out appropriately wherever he is detained. And that is Section 3142(i) of the Bail Reform Act, which provides in part: The judicial officer may by subsequent order permit the temporary release of the person, i.e., the defendant, in the custody of the United States marshal, or another appropriate person, to the extent that judicial officer determines such release to be necessary for preparation of the person's defense or for another compelling reason.

Now, what that says to me is that, on an appropriate showing, I could entertain -- I am not promising what I would do with it, but I could entertain an application for Mr. Bankman-Fried to spend time, possibly significant time as trial approaches, in counsel's office, under supervision and under appropriate safeguards, so that any problems with the correctional situation could be avoided for significant periods of time.